United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

77-1478

77-1478, 77-1479

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

B
P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DANIEL LEE RUCKER and
EUGENE C. SMITH,

Defendants-Appellants.

Appeal from a Judgment of Conviction in the United States District Court for the Western District of New York at 76-181

PETITION FOR RE-HEARING WITH
A SUGGESTION FOR A
RE-HEARING IN BANC

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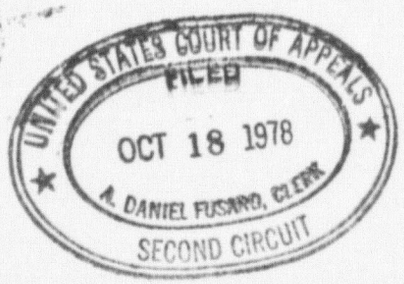

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
Plaintiff-Appellee,	:	DOCKET NO.
-vs-	:	77-1478 77-1479
DANIEL LEE RUCKER and EUGENE C. SMITH,	:	
Defendants-Appellants.	:	

PRELIMINARY STATEMENT

This petition is submitted on behalf of the defendant-appellant Eugene C. Smith, pursuant to Rules 40 and 35 of the Federal Rules of Appellate Procedure for a rehearing with a suggestion for a rehearing in banc of the above appeal on the grounds that the decision dated September 28, 1978 reflects a misapprehension of principles of law previously enunciated by this Court. This petition is specifically directed to that portion of the Court's decision which concluded that the trial Court's instruction to the jury on the interest of the defendant was not reversible error.

In the Court's opinion at page 4878 it stated:

> " Smith's and Rucker's contention that the trial Court's instruction on the interest of the defendant was reversible error because it did not have balancing language to the effect that "A defendant's vital interest in the outcome of the trial was not inconsistent with the ability to render truthful testimony" is not sufficient to present reversible error. Their reliance upon United States v Martin, 525 F. 2nd 703 (2nd Cir. 1977), and United States v Floyd, 555 F. 2d 45 (2d Cir.), is misplaced. In Martin the Court's instruction containing that language was approved. In Floyd this Court found an instruction similar to that here given to be adequate ..."

It is respectfully submitted that the Court failed to appreciate the prejudicial nature of the charge given by the trial Court and, furthermore, it failed to comprehend the precedent established by this Court in United States v Martin, Supra and United States v Floyd, Supra.

In order to appreciate the defendant's grounds for a rehearing, it is appropriate to review the portion of the charge that is claimed to have constituted error, the objections of defense counsel to it and the inconsistency between the Court's reasoning in the present case and the prior opinions of this Court.

The instruction which is claimed to be error was stated by the trial Court as follows:

> The law permits a defendant, at his own request, to testify on his own behalf. The testimony of an individual defendant is before you. You must determine how far it is credible. The deep personal interest which every defendent has in the result of his case should be considered in determining the credibility of his testimony. You are instructed that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation; and that the interest of a defendant is of a character possessed by no other witness and is, therefore, a matter which may seriously affect the credence that should be given to his testimony - (780).*

Following the Court's instructions to the jury, both defense counsel specifically objected to the above portion of the charge (788-89). However, the Court never responded to defense counsel objections, and in view of its silence it presumably denied the exception.

* (____) Refers to pages of the trial minutes contained in the Record of Appeal.

Rather than commenting on the trial Court's conduct in refusing to discuss the objection, this Court criticized defense counsel for failing to point out to the Court the absence of the words "that his vital interest is not inconsistent with his ability to render truthful testimony." (P. 4878)

The criticism of defense counsel is incredible in view of the fact that the trial Court never reviewed the proposed instructions that contained the error prior to them being given to the jury. The portion objected to was not a request made by the government, nor the defendants, and the first time it was heard by defense counsel was when it was read to the jury. Is it reasonable for this Court to require defense counsel upon hearing a charge read to the jury to be able to make specific note of the language that is missing and recite verbatim for the trial Court the language that it has failed to incorporate in its charge.

The Court's opinion places an impossible burden on defense counsel in preserving an exception and it is respectfully submitted that Rule 30, of the Federal Rules of Criminal Procedure, does not require defense counsel to be that specific. The objection that was made here was specifically directed to that portion of the charge which is claimed to have been made in error and that alone was sufficient to preserve the objection for review by this Court.

In addition to the Court's strained and overly protective reading (for the trial Court but not the defendant) of Rule 30, the Court's opinion also contained the following errors:

1) The Court claimed that the instruction given by the trial Court here was similar to the charge approved by the Court in United States v Floyd, 555 F. 2d 45 (2d Cir. 1977)(P. 4878)

It is quite evident in reviewing the instruction in the Floyd case and here, that little similarity exists. The Floyd charge contained not only balancing language (although not the exact words of the Martin charge) but it didn't contain the striking innuendoes which characterized the defendants as two people who had the greatest motive and strongest temptation to lie. (780)

2) The Court was further in error when it stated at P. 4878:

> "At no time have we ever specifically defined a required instruction on the interest of the defendant to be considered by the jury in evaluating his credibility."

Does this Court consider the specific instructions referred to in the Martin and Floyd opinions as nothing more than meaningless verbiage. One wonders what the purpose of these decisions are that deal with the appropriate charge on a defendant's interest if they are not intended to be followed by the trial Courts in this circuit. If Martin and Floyd didn't define the required instruction then what is preventing

the majority from defining such an instruction. The answer is obvious since the Martin and Floyd cases have clearly set forth the required charge and no further directives are necessary.

3) The Court proceeds to contradict itself by concluding that: "... the instruction as given by the Court was in accordance with those which have repeatedly been approved by us." (citations omitted) (P. 4878).

A careful reading of the cases cited by the Court fails to reveal any support for the trial Court's charge in the instant case.

In United States v Tyers, 487 F. 2d 828 (2d Cir. 1973) and United States v Scallafini, 487 F. 2d 245, Cert. denied 414 U S. 1023 (1973), the opinions fail to contain the specific charge dealing with the defendant's interest. In United States v Mahler, 363 F. 2d 673 (2d Cir. 1966) and United States v Sullivan, 329 F. 2d 755 (2d Cir.) Cert. denied 377 U. S. 1055 (1965) the cases contained charges which included balancing language and in Mahler the Court dealt with the interest of the government witness which it failed to do in the present case.

It is evident that the erroneous charge given by the trial Court below has never been previously approved by this Court.

4.) The majority opinion also stated:

> "The trial Court's instruction on the credibility of a defendant as a witness was not improper, and, particularly in the context of the entire charge, was not prejudicial, unfair or misleading." (4879)

Despite this statement of the majority which was composed of two District Court Judges, Circuit Judge Oakes was of the opinion that the charge was "... erroneous, prejudicial, and, in a close case hanging on defendant's credibility, devastating." (4888)

It is respectfully submitted that the issue of the defendant's credibility was the key issue throughout the trial of this matter. The trial involved a bank robbery in which the chief witness for the government was the actual robber himself, who after being given probation by a State Court, agreed to testify against his alleged accomplices. How more devastating could a charge have been for the Court to make no mention of the vital interest of the accomplice-informer and yet dwell at length on the motive that the defendants had to falsify their testimony.

CONCLUSION

The only appropriate action that should be taken here would be for the Court to reverse the conviction on the

grounds of the erroneous instruction which is clearly inconsistent with the previous opinions of this Court.

Dated: Rochester, New York
October 11, 1978

Respectfully submitted,

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THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NOS. 77-1478, 77-1479

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

DANIEL LEE RUCKER and EUGENE C. SMITH,

Defendants-Appellants.

CERTIFICATE OF SERVICE

I certify that on October 11, 1978, I caused two (2) copies of the PETITION FOR RE-HEARING FOR THE DEFENDANT-APPELLANT EUGENE C. SMITH to be served by mail, postage, prepaid upon the following:

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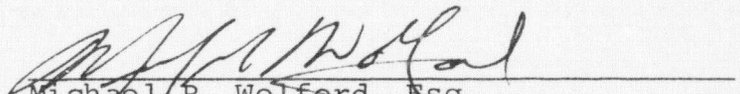

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